Park Manor Nursing Home, Inc. *and* Hospital Employees Local 1273, Laborers District Council of Baltimore and Vicinity. Case 5–CA–22595

September 30, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On May 5, 1993, Administrative Law Judge Walter H. Maloney issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Park Manor Nursing Home, Inc., Baltimore, Maryland, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Mark F. Wilson, Esq., for the General Counsel.
Edward D. McGuire, Jr., Esq., of Annandale, Virginia, for the Respondent.
John Singleton, Esq., of Baltimore, Maryland, for the Charging Party.

DECISION

A. *Statement of the Case*

WALTER H. MALONEY, Administrative Law Judge. This case came on for hearing before me upon an amended unfair labor practice complaint,[1] issued by the Regional Director of the Board's Region 5, which alleges that Respondent Park Manor Nursing Home, Inc.[2] violated Section 8(a)(1), (3), and (5) of the Act. More particularly, the amended complaint alleges that the Respondent informed its employees that they had been fired because of their union activities and that union representatives had jeopardized their jobs by calling a strike. The amended complaint further alleges that the Respondent discriminatorily discharged Mary L. Brown because of her union affiliations and that it has refused to recall 22 named strikers because of their union activities. It also alleges that the Respondent bargained to impasse over a nonmandatory subject of bargaining, namely the enlargement of the collective-bargaining unit which had been in place at the Respondent's facility for many years by insisting that supervisors and other nonunit personnel be allowed to perform unit work. The Respondent denies the commission of any independent violations of Section 8(a)(1) of the Act and asserts that it recalled all strikers and that its slowness in doing so was a matter of inadvertence or lack of job openings. It further asserts that it never bargained to impasse over the question of nonunit employees performing unit work. Upon these contentions the issues here were joined.

B. *The Unfair Labor Practices Alleged*

The Respondent is a corporation, wholly owned by Henry R. Goldbaum, which operates a nursing home for about 50 elderly patients in downtown Baltimore. The home itself has been in operation for many years under different ownership but, for the past 9 years or so, Goldbaum has been not only its proprietor but the administrator of the facility as well. For the past decade, the Respondent has been party to a series of collective-bargaining agreements with the Union covering a unit of geriatric nursing assistants (GNAs), dietary, and housekeeping employees. Their most recent contract expired on October 31, 1991, and no new contract has been concluded between the parties since that time.[3] The Respondent was found guilty of an unfair labor practice in an earlier Board case which was decided in 1985. *Park Manor Nursing Home*, 277 NLRB 197 (*Park Manor I*).

On August 12, 1991, the Union sent the Respondent a conventional 60–90 day letter notifying it of a desire to negotiate a new contract upon the expiration of the existing one. There is nothing in the record to suggest that the Respondent replied to this letter until the Union sent a second letter, dated October 21, 1991, notifying the Respondent under the terms of Section 8(g) of the Act (the health care amendments) that it was going to strike the facility at the expiration of the current contract, i.e., at 12:01 a.m. on October 31. The following day Stephan J. Boardman, the Respondent's long-time labor counsel, wrote Kenneth G. Raposa, president and business manager of the Laborers' District Council, agreeing to meet on October 25. In his letter, Boardman asked Raposa to forward any union proposals in advance of the meeting so that they could be reviewed by company officials before negotiations began.

At the October 25 meeting, the Union asked for a 5-percent increase for all employees, most of whom were then

[1] The principal docket entries are as follows:
Charge filed by Hospital Employees Local 1273, Laborers' District Council of Baltimore and Vicinity (the Union) against the Respondent on March 9, 1992, and amended on March 31, 1992; complaint issued by the Regional Director, Region 5, against the Respondent on April 23, 1992, and amended on September 25, 1992; hearing held in Baltimore, Maryland, on March 2, 3, and 4, 1993; briefs filed with me by the General Counsel, the Charging Party, and the Respondent on or before April 12, 1993.

[2] The Respondent admits and I find that it is a Maryland corporation which maintains an office and place of business in Baltimore, Maryland, where it is engaged in the operation of a nursing home. In the course and conduct of this business, the Respondent has annually purchased and received goods and services valued in excess of $50,000 directly from points and places located outside the State of Maryland. Accordingly, the Respondent is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. The Respondent is a labor organization within the meaning of Sec. 2(5) of the Act.

[3] Actually, the old contract was extended, by oral agreement of the parties, for a period of 2 weeks while negotiations were in progress but, at the expiration of the extension, no further extensions were made.

earning the minimum wage of $4.25 an hour.[4] Boardman refused, saying that the Company was in dire financial straits and could offer no wage improvement at all. He offered to let the Union audit the Company's books if it disputed his assertion. Throughout negotiations, the Union reminded the Respondent that Maryland state medicaid allowances, from which the Respondent derives the bulk of its revenue, were scheduled to be increased and that the Union would be willing to agree to an increase which was contingent upon any increases in medicaid payments. The Company wanted to eliminate the checkoff and union-secuity provisions which existed in the expired contract. It also wanted to eliminate any contractual restrictions which would prohibit supervisors and others from performing unit work. This issue, sometimes referred to in the record as the supervisory or bargaining unit issue, and the elimination of checkoffs, were items which had a bargaining history that had been a source of conflict between the parties in the preceding year. About the only thing the parties agreed upon during this meeting was a 2-week extension of the existing contract.

Over a period of time, the Respondent had been negligent in forwarding to the Union the dues payments which it had deducted from the wages of its employees and had been retaining the money for its own uses. Apparently, this practice had become commonplace in the nursing home industry in Baltimore, an industry in which this Union has several contracts. When other means of collection had failed, officials of the Charging Party met with the State's Attorney for Baltimore City and lodged a complaint, not only against this Respondent but against other nursing homes as well, for violation of a Maryland statute which makes it a misdemeanor to retain checked-off dues for more than 30 days without remitting them to the union to which they are owed. A warning letter had been sent to the Respondent by the State's attorney regarding its failure to make prompt payments of such dues.

The so-called supervisory issue arose out of a grievance filed by the Union in the summer of 1991 relating to unit worked performed by Supervisor Selina Jones. Jones was a supervisory GNA on the first shift and was hired as a full-time employee during GNA bargaining unit work on the second shift. The Union claimed that either she should be prevented from doing unit work on the second shift or, if she were assigned to such work to supplement her income, she should be required to pay union dues. The matter was settled short of arbitration by an agreement, concluded in the summer of 1991, whereby Jones would be obligated to pay dues if she worked a second shift as a unit employee and the Company was required to pay the Union the equivalent of the dues which Jones owed from the time she began her second-shift work. The net effect of the Company's proposal in October was to bargain its way out from under this agreement by deleting from the contract any prohibition restricting supervisors from doing unit work on a regular basis. Boardman wrote a letter to Singleton, dated October 26, in which he summed up the Company's position on various disputed matters. In that letter, he requested an extension of the right to perform unit work to all nonunit personnel, not just supervisors.[5]

The parties met again on November 13 and 22 and December 12. The last meeting was held under the auspices of a mediator. Throughout this period of time, written strike notices had repeatedly been served on the Respondent by the Union, the last one setting a strike for 12:01 a.m. on December 13. At the December 12 meeting, Boardman made an offer of a 1-percent across-the-board increase, amounting to about 4 cents an hour, during the first year of the contract and a 2-percent increase during the second year. The company proposal also called for a rate of $4.40 after completion of a 90-day probationary period. The Union agreed to lower its 5-percent increase request to 4 percent. However, there was no movement on the Company's insistence on the supervisory or bargaining unit proposal or upon its proposal to eliminate checkoff, although the Company did remove its objection to a union-security clause.[6] Boardman told union negotiators that the offer presented was not the Company's final offer, whereupon Clarence Logan, the Union's International representative for Maryland, told Boardman that he had better present the final offer because the employees were not going to accept the one that was on the table.

On the afternoon of December 12, union members held a meeting and voted to strike. The strike began at midnight. Every employee in the bargaining unit went on strike, except for Mary L. Brown, a GNA who had worked for the Respondent for 12 years. Brown had previously received permission to go on vacation and was absent on leave throughout the entire strike.

On Friday, January 3, the parties met again but only briefly. John F. Singleton, the Union's attorney, attended this meeting along with other union negotiators. The Union again offered a 4-percent increase in wages, contingent upon legislative approval of improvements in medicaid benefits. It was rejected. Singleton then reiterated the union offer on supervisory personnel doing unit work, saying that the Union would give the Company the standard language found in other nursing home contracts. This offer also was rejected, whereupon the meeting concluded.[7]

About 6:30 p.m., Singleton received a phone call from Logan informing him that the strikers had held a meeting and had agreed to accept the Company's economic proposal. Logan asked Singleton to call Boardman and then get back to him because the employees wanted to return to work at midnight when the shifts changed. I credit Singleton's testimony that he phoned Boardman at the latter's home and in-

[4] Some of the Respondent's employees had been employed by the home for 15 to 20 years.

[5] Excluded from the contract unit description were office clerical employees, all other clerks, physicians, dentists, registered nurses, licensed practical nurses, activities directors, technical and professional employees, guards, confidential employees, and supervisors as defined in the Act.

[6] During this meeting, Boardman proposed a tradeoff, offering to permit union security if the Union would agree to eliminate any retrictions on supervisors performing unit work. The Union refused but said it would give the Company a contract language similar to language found in other nursing home agreements, which would permit supervisors to perform unit work in the case of emergencies up to 5 percent of the supervisor's time. It was rejected by Boardman, who said that the Company wanted no restrictions of any kind.

[7] In a sidebar conversation during this session, Boardman told Singleton that the Company was not taking back any strikers because they had all been replaced.

formed Boardman that the strikers had accepted the wage proposal and wanted to return to work. He also told Boardman that the Union had not agreed to abandon its request for checkoff and was not going to give the Company an unrestricted right to assign unit work to nonunit employees. Boardman replied that he could not reach Goldbaum at that time but would be in touch with Singleton the following Monday morning.

Singleton then reported the contents of this conversation to Logan and suggested that Logan try to reach Goldbaum directly and make an effort to get the strikers back to work. Logan called the home and spoke with Beatrice Williams, a GNA supervisor who normally takes incoming calls at the home during the late afternoon shift. He told Williams that the employees were ready to return to work unconditionally and asked her to get this message to Goldbaum or to Edwards, the supervisor of nursing. Williams said that she would do so. Logan also asked her for Goldbaum's phone number but she declined to furnish it.[8]

On Monday, January 6, Singleton faxed to Boardman the following letter:

> This letter serves to confirm that the striking employees of Park Manor Nursing Home have made an unconditional offer to return to work. Please notify me of the name of any alleged permanent replacements, date of hire, and rates of pay. Also notify me of the names of strikers who will be returned to work and date of return.[9]

Boardman acknowledged, in a letter dated January 7, that the Union had made an unconditional offer to return all strikers as of January 6 and reiterated to him that the home had hired previous permanent replacements so there were no vacancies. He assured Singleton that, as vacancies arose, strikers would be recalled to work and proposed that employees be returned on the basis of the home's determination of their prior work record ''those . . . with the best records will be returned first.'' With respect to the outstanding supervisory or unit work issue, Boardman proposed, as follows, in his letter:

> As discussed previously in bargaining, the Home proposes to remove any and all restrictions upon non-unit personnel from performing bargaining-unit work. Thus, for example, the restrictions in Article I, Section C3 would be deleted.[10] We also propose to add a simple clause to the new contract, as follows: ''Notwithstanding any other part of this Agreement, there shall be no restrictions or limitations of any kind or nature regarding non-unit personnel who perform any bargaining-unit work.

This proposal was never accepted by the Union nor has the Union ever agreed to abandon its insistence on checkoff. The parties have never agreed to a contract so the Respondent, insisting upon a written contract before implementing its wage offer, has never begun to pay its employees the increases in wages it offered at the bargaining session which took place immediately before the strike.

At the outset of the strike, the Respondent began to hire replacements. Goldbaum interviewed most of them but, in some five to seven instances, the interviews were conducted by the Respondent's personnel director, Battool Itijazi.[11] A few replacements, estimated by Goldbaum at between 6 and 10, quit a few days after they were hired. He admits learning of the request of the strikers to return to work in a phone call on January 6 but continued to hire replacements after that time. He attributed this action first to ''inadvertence'' and later to desire to have ''back-up'' employees on the payroll in case regular employees did not show up for work. In the next 5 months the Respondent hired a total of 23 new employees in bargaining unit positions.[12] Normally, they began their employment the day after they were interviewed. Respondent did not begin calling strikers back to work until the end of February.

On or about January 8, the Respondent called a meeting of the first-shift strike replacements and gave the following letter to them:

> I am writing this memorandum to all new employees to inform all about the negotiations with the Union for a new agreement. Agreement has been reached on all economic issues, such as wage rates and fringe benefit levels. One of the few remaining issues concerns your continued employment. As you know, we hired you as permanent replacements (that is, as regular, not tem-

[8] Williams supervises three or four employees on the 3 to 11 shift. She is a licensed practical nurse (LPN) who is empowered to assign work to GNAs and who exercises discretion in doing so. She is also empowered to issue reprimands and can authorize overtime. I conclude that she is a supervisor within the meaning of the Act. However, she also routinely takes phone calls during the afternoon shift and relays written messages to the recipients of those calls. As such, she is an agent for this purpose, quite apart from her supervisory status. On the occasion in question, she admitted receiving Logan's call and leaving a message for Goldbaum, as requested.

[9] Goldbaum prepared a letter to Boardman, dated January 9, which is in evidence, containing the names of 32 individuals who had been hired by the Respondent between December 13, 1991 and January 3, 1992. All of these employees received a starting wage of $4.25 an hour.

[10] Art. I, C3 of the expired contract provided:

> The Employer agrees to assign only bargaining unit employees unit work except in emergencies and extreme circumstances.

[11] Itijazi signed her name on one letter which is in evidence as Battool Zaky. In its answer to the amended complaint, the Respondent denied that she was a supervisor within the meaning of the Act. Goldbaum insisted that he retained final authority to hire all employees. However, he admitted that several strike replacements were interviewed only by Itijazi and that they were hired upon her recommendation. I conclude that Battool Itijazi was and is a supervisor within the meaning Sec. 2(11) of the Act since she could effectively recommend the hiring of employees.

[12] New hires who were placed on the Respondent's payroll in the first months of 1992 are as follows: Lisa Bushrod, laundry, hired 1/29/92; Patricia Simms, dietary, hired 2/4/92; Alice Paul, dietary, hired 2/9/92; May Brooks, dietary, hired 2/9/92; Kendall Pitts, GNA, hired 2/17/92; Ricky Anderson, housekeeping, hired 2/23/92; Michael Simpson, housekeeping, hired 2/21/92; Sharon Edwards, dietary, hired 2/27/92; Ingrid Rudolph, dietary, hired 3/4/92; Constance Gilliam, GNA, hired 3/11/92; Toni Stanley, SNA, hired 3/12/92; Veila Jones, GNA, hired 3/12/92; Lorella Joe, GNA, hired 3/12/92; Carmaletta Bowe, dietary, hired 3/13/92; Brenda Jordan, GNA, hired 3/17/92; Melford Coke, GNA, hired 3/17/92; Denise Haywood, GNA, hired 3/18/92; Phyllis Palmer, GNA, hired 5/14/92; Shirley Wright, housekeeping, hired 5/15/92; Linda Harold, dietary, hired 5/15/92; Tracy Royster, dietary, hired 5/20/92; Betty Cooper, dietary, hired 5/26/92; Dorothea Atterbury, dietary, hired 6/1/92.

> porary, employees) for those employees who went on strike.
>
> On Monday, the Union made an unconditional offer for the striking employees to return to work. In essence, the Union wants us to take these employees back now, which would mean that those employees hired as replacements would have to be laid off, as there are not enough jobs for both groups to work at the same time.
>
> We have informed the Union that it is the Home's position that the permanent replacements will keep the jobs at this time, and that the employees formerly on strike will be returned to work as vacancies for which they are qualified become available.

The General Counsel presented witness Catherine Cannon who testified credibly and without contradiction that she was interviewed for a job during the strike and was told by Itijazi that the job opening in question was temporary but could become permanent. When strike replacement Huey Healthington was interviewed, he asked Goldbaum what his chances were of becoming permanent. Goldbaum told him that, after 90 days, he would let Healthington know. During the strike, Goldbaum told him that he was a good worker and that his chances of being a permanent one were fine. On March 18, Goldbaum terminated Healthington. I credit Healthington's statement that, at the meeting held in early January for strike replacements, Goldbaum stated that the strikers did not work for him any longer and that the replacements were his permanent workers.

I credit the testimony of GNA Anita Frazier, who went on strike on December 13 and who needed a written statement concerning her status to be presented to her landlord. She spoke to Itijazi in the personnel office and the latter agreed to give her a letter indicating that she had been laid off at the beginning of January. While she was in the office, Goldbaum came in and asked her how the Union was treating her. In the course of the conversation, he told Frazier that Emily Hall, the Union's shop steward, had caused all the home's employees to lose their jobs by going out on strike.[13]

As noted previously, Mary Brown was a GNA who had worked years for the Respondent. She was on an approved vacation while the strike was in progress.[14] She returned from her vacation on January 13, about a week or so after the strike had ended, and phoned the home to see about getting back to work. She was surprised to learn that a strike had taken place during her absence and told Supervisor Dorothy Norris that she was scheduled to return to work the following day. At this point in the conversation, Norris referred her to Goldbaum, who told her over the phone, ''I have fired all the Union employees and have replaced them.'' Brown said that there must be a mistake, reminding him that she had been on vacation throughout the strike. Goldbaum simply said that he ''couldn't help it.'' She told Goldbaum that she was owed a couple of checks, so he instructed her to speak to his bookkeeper.

Brown was offered a job in late February and returned to the home for 2 days. She informed them that she had to have a leg operation and needed some time off for that purpose. Her request was approved and she was assured of a job once she received a medical clearance to return. As yet, that clearance has not been forthcoming.

On February 25, 1992, Goldbaum wrote certified letters to five[15] former strikers and offered them positions. All accepted. On March 9, the first charge in this case was filed. On March 20, 12 more employees, including Shop Steward Emily Hall, were offered reinstatement. On May 28 and June 3, the balance of the striking employees were offered reinstatement.

This case was originally scheduled to be heard by an administrative law judge on or about August 31. No conventional collective-bargaining sessions took place from the time the strike ended until that date (or thereafter). However, extensive settlement discussions of the pending unfair labor practice case took place in August, stimulated by conference calls from the administrative law judge assigned to the case. In the course of those discussions, the Respondent modified its position on the subject of unit work and proposed the following language:

> The parties agree that certain occasions may arise when supervisors can perform bargaining unit on a temporary basis. Such events shall include duties involved in training bargaining unit personnel, demonstrations, and emergency fill-in of/or assisting bargaining unit employees. Such work shall not comprise more than 10% of supervisory duties and shall be performed only when patient needs require such work.

Notwithstanding agreement on this point, the case itself was not settled nor have the parties concluded a final contract.

C. *Analysis and Conclusions*

1. Independent violations of Section 8(a)(1) of the Act

(a) When, on or about January 14, Goldbaum informed Mary L. Brown that he had fired all the union employees, the Respondent engaged in interference with protected, concerted activities in violation of Section 8(a)(1) of the Act.

(2) When, in early January, Goldbaum told Anita Frazier that Shop Steward Emily Hall[16] had caused all the home's employees to lose their jobs by going on strike, the Respondent was once again engaging in interference with protected concerted activities in violation of Section 8(a)(1) of the Act.

2. The discharge of Mary L. Brown

Mary L. Brown was notified of her discharge when she returned from an authorized absence which coincided with a strike of the Respondent's facility. Brown did not participate in the strike, although, as a longtime employee of the home, she was a union member. Since she was absent from work

[13] Goldbaum denies making this statement. I discredit Goldbaum, who was a thoroughly unreliable witness. He had a selective memory, made inconsistent statements, and gave testimony which was inherently unbelievable. I am not the first administrative law judge to discredit Goldbaum. See *Park Manor I.*

[14] Goldbaum admitted on the stand that her request for a vacation had been approved prior to the strike.

[15] They were Mary Brown, Mary Garris, Lenora Powell, Thelma Averette, and Bernetta Parker.

[16] Hall is the union steward whose discriminatory discharge was the subject of the Board case in *Park Manor I.*

with the Respondent's permission, she was not unilaterally withholding her labor and hence could not be deemed a striker. *Toledo (5) Auto/Truck Plaza*, 300 NLRB 676 (1990). The Respondent never gave Brown any rational explanation for her discharge, other than the fact that all union employees had been eliminated from its payroll. The Respondent has yet to explain why she was not placed back on the work schedule in mid-January when she returned from vacation. Hiring a strike replacement for someone who has been away on a company-authorized absence defies logic and lends credence to Brown's account of her conversation with Goldbaum when he told her that all former employees had been discharged.

I have credited Brown's account of this conversation, testimony which was never contradicted in the record. Discharging an employee for going on strike is a patent and indisputable violation of Section 8(a)(1) and (3) of the Act, and such a violation includes the discharge of someone who was not actually on strike but was included within the group of discharged strikers to fulfill an employer's desire to purge its payroll permanently of anyone who had anything to do with the Union. Accordingly, by discharging Mary L. Brown because of her membership in and sympathies with the Union, the Respondent violated Section 8(a)(1) and (3) of the Act.

3. The discharge of the strikers

The General Counsel has prosecuted a portion of the amended complaint on alternative theories. On the one hand, he alleges that the Respondent in fact discharged all of its strikers, although it did not notify them of their discharges until after the strike was over. Accordingly, any replacements which were hired in their stead during the strike could never be considered in law as anything more than temporary replacements who would have to be discharged when the discriminatees asked to come back to work. Backpay would start to run from that point in time until a discharged striker was offered full reinstatement to his or her former position or to an equivalent one. The General Counsel's alternative theory is that the strikers were entitled to reinstatement, under the doctrine established in *NLRB v. Fleetwood Trailers*, 389 U.S. 375 (1967), to any vacancies which existed at the time their reinstatement request was made and to any vacancies which might arise thereafter. When the Respondent continued to hire additional replacements while returning strikers were waiting in the wings, it violated Section 8(a)(1) and (3) of the Act and backpay awards in that event would have to involve determinations of when each vacancy arose following the offer to return.[17]

While the latter theory is indisputably supported by the record,[18] the former theory has a solid basis in fact and I adopt it. In determining whether these strikers had in fact been discharged, not merely replaced before they offered to return to work, the events in question must be viewed ''through the strikers eyes.'' *Trident Recycling Corp*., 282 NLRB 1255 at 1260 (1987), citing *Pennypower Shopping News*, 253 NLRB 85 (1980). No special words must be spoken in order to effectuate a discharge. Indeed, no words need be used at all. *Jewell Smokeless Coal Corp*., 175 NLRB 57 (1969). It is enough that the Respondent's words or deeds reasonably lead a prudent person to believe that he has been discharged. *Ridgeway Trucking Co*., 243 NLRB 1048 (1979). Goldbaum not only said that he had discharged the strikers. He acted as if he had done so as well. At an employee meeting on or about January 8, he told strikers, as reported by Healthington, that the strikers did not work for him any longer. He also told striker Frazier that the Union had caused all of the strikers to lose their jobs, and the term he used to Brown—that the union employees had been ''fired''—suggests strongly that this is exactly what did become of them. Any quibble over shades of meaning in Goldbaum's choice or words or inartful way of expressing himself can be resolved by what, in fact, Goldbaum did. After strikers had admittedly offered to return unconditionally, Goldbaum continued to hire 23 others in their places in clear violation of the *Fleetwood* doctrine. Such action is consistent with, if not compelling evidence of, the fact that strikers were regarded by Goldbaum not as employees with continuing rights to return but as former employees who had totally severed any connection with the Respondent and lost any legal standing to regain a position on its payroll. Accordingly, I conclude that the Respondent discharged the employees who were named in the amended complaint as discriminatees because they went on strike and, having done so, and in so doing, violated Section 8(a)(1) and (3) of the Act.

4. Bargaining to impasse over expansion of the bargaining unit

The Board has long held that the issue of whether supervisors may perform bargaining unit work is a mandatory subject of bargaining and it has never retreated from this position. *Crown Coach Corp*., 155 NLRB 625 (1965); *Operating Engineers Local 12*, 234 NLRB 1256 at 1258 (1978); *Maintenance Service Corp*., 275 NLRB 1422 at 1426 (1985). The reason for this holding was set forth by Trial Examiner Herman Marx in the *Crown Coach* decision:

> The obvious purpose of the clause in question is to preserve nonsupervisory production and maintenance work for employees in the unit, and, plainly, contrary to [the employer's] position, the mere fact that the proposed terms would affect supervisors does not relieve the Company of an obligation to bargain with respect thereto. On the contrary, the clause is a mandatory subject of bargaining, as its provisions, dealing as they do with employment opportunities for employees in the unit, pertain to their ''wages, hours, and other terms and conditions of employment,'' within the meaning of Sec-

[17] The alternative justifications advanced by Goldbaum as business justifications for failing to recall strikers to vacancies which arose in the work force were preposterous. To say that he hired 23 employees, over a period of 5 months, who should not have been hired because of ''inadvertence'' strains credulity to the breaking point. His other contention, namely that he needed a backlog of employees to be on call in the event that his other employees failed to report to work, ignores the fact that he did not put the post-January 3 placements merely on call but on the payroll. It was a tacit admission that he wanted to be rid of the employees who struck the home and was taking punitive action against them.

[18] In its brief, the Respondent admits that it improperly hired new employees after strikers offered to return to work.

> tion 8(d) of the Act, which defines the bargaining obligations of employers and labor organizations. [*Supra* at 628.]

More recently, the Board had before it the other side of the same coin, a management proposal which would expressly allow supervisors to do unit work. With regard to that provision, Administrative Law Judge Jay R. Pollack wrote, with Board approval:

> Under the 1984–85 Agreement, the pressroom manager could only do bargaining unit work if he was a member of the Union. Respondent's proposal deleted that restriction and provided that ''The publisher or his designated representatives *may* do unit work.'' [Emphasis added.]
>
> [Respondent's negotiator] Cowell testified that the purpose of the proposal was to allow the pressroom manager to participate in training, emergencies, trouble shooting, and production situations. Cowell explained that because the pressroom managers are the most skilled and knowledgeable persons regarding the expensive presses, Respondent wanted them to be able to do unit work. General Counsel concedes that this is a mandatory subject of bargaining. See e.g., *Crown Coach Corp*., 155 NLRB 625 (1965). *McClatchy Newspapers, Inc*., 307 NLRB No. 22, slip opinion, page 6.

In the present case, the Respondent did not propose to alter the bargaining unit description nor did it seek to include in the unit any of the many categories of employees who were expressly excluded from coverage in the previous contract. What it wanted was to allow supervisors—and presumably a host of other excluded employees—to be able to perform unit work without restriction. The Union wanted some restrictions. Understandably, the Union objected to the Respondent's proposal, arguing that such a provision would result in a serious erosion of bargaining unit work. Precisely because its contention was a serious one affecting availability of unit work, one, it necessarily follows that the provision in question affected ''wages, hours, and terms and conditions'' of unit employees and was a mandatory subject of bargaining. In many respects, the work preservation clause at issue here is similar to a no-subcontracting proposal, a matter which is clearly a mandatory subject of bargaining. *Storer Communications*, 295 NLRB 72 at 78 (1985). Just as the Union pressed its own version of such a clause, the Respondent was entitled to insist to impasse on its version of a supervisory or unit work provision, and this is exactly what it did. Accordingly, so much of the amended complaint which alleges that the Respondent here violated Section 8(a)(1) and (5) of the Act by doing so must be dismissed.

On the foregoing findings of fact and conclusions of law, and upon the entire record here considered as a whole, I make the following

CONCLUSIONS OF LAW

1. Park Manor Nursing Home, Inc. is now and at all times material here has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Hospital Employees Local 1273, Laborers' District Council of Baltimore and Vicinity, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Mary L. Brown and the other employees named in the amended complaint because of their union membership and sympathies and because they had gone on strike, the Respondent has violated Section 8(a)(3) of the Act.

4. By the acts and conduct set forth above in Conclusion of Law 3; by telling employees that it had fired other employees because they had gone on strike; and by telling employees that the union steward had caused them to lose their jobs by going on strike, the Respondent has violated Section 8(a)(1) of the Act.

5. The aforesaid acts and conduct have a close, intimate, and substantial effect on the free flow of commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I will recommend to the Board that it be required to cease and desist therefrom and to take certain affirmative actions designed to effectuate the purposes and policies of the Act. Since the violations of the Act found are repeated and pervasive and evidence on the part of this Respondent an attitude of disregard for its statutory obligations, I will recommend to the Board a so-called broad 8(a)(1) remedy designed to suppress any and all violations of that section of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979). The recommended Order will also recommend that the Respondent be required to offer to Mary L. Brown and to all the discriminatees named in the amended complaint full and immediate reinstatement to their former or substantially equivalent employment and to make them whole for any loss of earnings which they may have sustained by reason of the discriminations practiced against them, in accordance with the *Woolworth* formula,[19] with interest thereon at the rate prescribed by the Tax Reform Act of 1986 for the overpayment and underpayment of income tax. *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Since the discriminatees herein are discharged strikers, the Respondent was under a duty to offer them immediate reinstatement upon their offer to return to work. So backpay computations should begin as of midnight, January 3, 1992. I will also recommend that the Respondent be required to post the usual notice advising its employees of their rights and of the results in this case.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

ORDER

The Respondent, Park Manor Nursing Home, Inc., Baltimore, Maryland, its officers, agents, supervisors, attorneys, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that it had fired other employees because they went on strike or telling employees that union officials had caused them to lose their jobs by going on strike.

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[19] *F. W. Woolworth Co*., 90 NLRB 289 (1950).

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Discouraging membership in or activities on behalf of Hospital Employees Local 1273, Laborers' District Council of Baltimore and Vicinity, AFL–CIO, or any other labor organization, by discharging employees or by otherwise discriminating against them in their hire or tenure.

(c) By any other means or in any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to Mary L. Brown and to every other employee named in the amended complaint full and immediate reinstatement to their former or substantially equivalent employment, without prejudice to their seniority or to other rights previously enjoyed, and make them whole for any loss of pay or benefits suffered by them by reason of the discriminations found, in the manner described above in the remedy section.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Baltimore, Maryland facility copies of the attached notice marked ''Appendix.''[21] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that, insofar as the amended complaint herein alleges matters which have not been found to be violations of the Act, the amended complaint is hereby dismissed.

[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

Park Manor Nursing Home, Inc. is posting this notice to comply with an order of the National Labor Relations Board which was issued after a hearing in this case in which we were found to have violated certain provisions of the National Labor Relations Act.

WE WILL NOT tell employees that we have fired other employees because they have gone on strike, and WE WILL NOT tell employees that union officials have caused them to lose their jobs by going on strike.

WE WILL NOT discourage membership in or activities on behalf of Hospital Employees Local 1273, Laborers' District Council of Baltimore and Vicinity, AFL–CIO, or any other labor organization, by discharging employees or by otherwise discriminating against them in their hire or tenure.

WE WILL NOT by any other means or in any other manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed to them by Section 7 of the Act.

WE WILL offer to Mary L. Brown, Patrice Anderson, Thelma Averett, Sandra Beard, Shirley Campbell, Martha Dixon, Barbara Duckett, Larry Ebb, Barbara Epps, Anita Frazier, Mary Garris, Emily Hall, Elizabeth Jackson, Janice McLeod, Helen Burley Minter, Cosmos Nwagbara, Beretta Parker, Lenora Powell, Linda Smith, Kimberly Thomas, Mary White, and Anita Williams full and immediate reinstatement to their former or substantially equivalent employment, without prejudice to their seniority or to other rights previously enjoyed, and make them whole for any loss of pay or benefits suffered by them by reason of the discriminations found in this case, with interest.

PARK MANOR NURSING HOME, INC.